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No. 622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

DAVID H. MITCHELL, PETITIONER,

VS.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner David H. Mitchell, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the United States District Court for the Western District of Missouri.

OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 122) is reported in 208 F. 2d 854.

JURISDICTION.

The judgment of the Court of Appeals was entered January 6, 1954 (R. 129). An order denying a petition for rehearing was entered February 8, 1954 (R. 143). An order staying mandate was entered February 18, 1954 (R. 143). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTIONS PRESENTED.

(1) Is trial court authorized in income tax prosecution, under Federal criminal law and constitutional guarantees of Due Process, to permit an inference of unreported income to arise from Government's evidence of increase in taxpayer's assets in excess of his reported income?

(2) Does Government fail to make a Net Worth criminal case of unreported income when it offers no testimony relative to taxpayer's receipts from gifts or inheritances during tax period involved, and offers evidence as to loans only from banks in which taxpayer kept deposits; or does the defendant have the burden of establishing such receipts from gifts, inheritances and loans?

(3) In income tax prosecution by Net Worth method, is taxpayer's net worth, taken from his financial statements and based on market values $150,000 in excess of cost, ad-

missible to corroborate Government's closing Net Worth Statement, based on cost?

(4) Are the trial court's instructions correct when it computes taxpayer's income by comparing beginning net worth, based on cost, with ending net worth, based on market values $150,000 in excess of cost, and states that said purported income is evidence of willful tax evasion?

(5) Are income tax payments for twelve years prior to indictment period admissible to construct beginning net worth or for any other purpose, when Government agent testifies they have no bearing on such net worth, and when they create suspicion of tax evasion long prior to indictment period?

(6) Does Court of Appeals properly construe Rule 52(b) of Rules of Criminal Procedure when it establishes local rule of decision that failure of proof and errors in argument and instructions cannot be considered unless brought to the attention of the trial court; and, if so, what is the purpose and effect of Rule 52(b)?

(7) Does Court of Appeals properly construe Rule 52(a) of Rules of Criminal Procedure, and the controlling decisions of this Court, when it establishes local rule of decision that conviction will not be reversed for errors at trial if Court of Appeals believes guilt was established by "abundant competent proof"?

(8) Must record of trial convince appellate court that there was a miscarriage of justice and that defendant is innocent before it will reverse a conviction?

(9) Should conviction be reversed, despite defendant's failure to object at trial, when Government's closing argument includes reference to defendant's failure to testify and erroneous statement that trial court had ruled that

evidence, favorable to defendant, was "not the facts and the truth"; and when trial court instructs that testimony that disputed payments were not made is legally "negative testimony" which is "weak testimony" as compared with positive testimony of payment, and refuses to give defendant's requested instruction that negligence of third persons is a defense to criminal charge of income tax evasion?

STATEMENT.

Petitioner was convicted in the United States District Court for the Western District of Missouri on the first four counts (1945-1948), and acquitted as to the last two counts (1949-1950), of an indictment charging violations of Section 145(b) of the Internal Revenue Code, 26 U. S. C., in which it was alleged that petitioner knowingly filed false and fraudulent income tax returns for the calendar years 1945 through 1950 (R. 1-4, 79-80, 86). He was sentenced to total imprisonment of four years, and fined in the sum of $20,000 (R. 80-82); and upon appeal the judgment was affirmed by the Court of Appeals for the Eighth Circuit (R. 129). Rehearing was denied February 8, 1954 (R. 143).

Prosecution was based on two distinct theories: First—the Net Worth method of establishing income in excess of that reported in the tax returns; and Second—proof of specific items of alleged income not reported (R. 5). The Government's Net Worth conclusions appear in its Net Worth Statement (R. 9), which shows reported income during the four years for which petitioner was convicted averaging $32,000 per year, and, the Government contends, unreported income in almost the same amount. The specific omissions claimed by the Government average about $8,000 per year (R. 23-5, R. 124).

Certain items of alleged specific omissions which run through several years, including years for which petitioner was acquitted, may be disregarded. Relevant items of alleged specific omissions are (1) alleged receipts of $50 per week from taverns during 1945-8, in addition to reported income; (2) omitted rentals of $6,930 in 1945 from additional real estate; and (3) alleged receipts of $4,801.04 in 1947, representing the difference between 20% of gross receipts from the Three Bachelors Tavern and reported income, based on 10% of such receipts (R. 22-5). Receipt of the alleged $50 payments was sharply contested (R. 16-21, 41-47); proof of the alleged 20% receipts in 1947 was, at best, in balance (R. 105-6, 115-6, 51); and the omitted rentals in 1945 were admitted and explained (R. 44).

(1) Relative to Failure of Net Worth Proof.

The Government's Net Worth case as to 1949 and 1950 was met, and defendant was acquitted for said years, by proof of errors in bookkeeping and in preparation of petitioner's tax return (R. 52-55); and as to the other years, was met by proof of the bookkeeping and tax reporting system used by accountants and bookkeepers for petitioner during the relevant years, and of his lack of personal control or knowledge thereof (R. 43, 46, 48-51). In addition, petitioner contends the Government did not make a Net Worth case in that it offered no evidence relative to the source of the increases claimed by it, omitted all proof as to petitioner's gifts and inheritances during said period (R. 8-9), offered testimony of loans only from banks in which petitioner kept deposits and no proof as to loans from other sources (R. 15-16, 96, 102), and the Revenue Agents confessed complete inability to explain or identify the increases shown on Government's Net Worth Statement (R. 26-28).

(2) Relative to Use of Petitioner's Financial Statements.

In offering the Government's Net Worth proof, the Revenue Agent testified repeatedly that all assets listed in the Net Worth Statement were valued at cost, and that it would be a mistake to use market values in making such a computation (R. 8, 11, 26). In alleged corroboration of said proof, however, the Government was permitted to offer in evidence, over vigorous objection, figures as to petitioner's net worth in March, 1949, and February and October, 1950, as listed by him in financial statements given to a bank in order to obtain loans, despite testimony that such statements are made upon present market value rather than cost, and despite the direction on the face of said statements that real estate be listed "at actual market value." (R. 29-41, 11-14). Analysis of individual properties listed in the October, 1950, financial statement (R. 37, 38), as compared with the Government's Net Worth Statement for December 31, 1950 (R. 9), discloses that the former contains market values in excess of cost valuations in an amount exceeding $150,000. This appears as follows:

	Appellant's Financial Statement (R. 37, 39) (Market)	Government Net Worth Statement (R. 9) (Cost)
Oil and Gas Wells	$ 75,000.00	$ 23,699.77
1801 Holmes	18,000.00	18,531.75
1109 Broadway (1111 Broadway)	12,000.00	3,650.00
1117 Broadway	15,000.00	10,431.70
1114-16 Wyandotte	75,000.00	43,692.25
1217 Wyandotte	60,000.00*	63,225.53
1513 Main (1523 Main)	7,500.00*	6,500.00
711 West 12th St.	8,500.00	9,272.90
3732 Main	50,000.00	29,515.43
1617 Genessee	12,000.00	5,596.69
3501-09 Troost (Jewell Bldg.—R. 15)	62,557.35**	59,661.35
3114 Karnes	9,200.00**	3,446.71
405 East Armour (Richelieu Apt.—R. 15)	70,540.53**	46,412.91
Total	$475,297.88	$323,636.99

*Listed by appellant at "cost"

**Net value, after deducting mortgage to conform with Government values based on net equities (R. 15).

The trial judge instructed the jury that petitioner's income could be computed by comparing his 1945 beginning net worth (based on cost) with his 1950 ending net worth as contained in said market-value financial statements, and proceeded to compute said purported income as being approximately $60,000 a year (R. 72). This alleged income, based on unrealized market valuations, the judge compared with appellant's reported income averaging less than $40,000 a year. The trial judge concluded the comparison by stating that "there is no controversy about the financial statements," and that said comparison provides a "basis to determine whether * * * there was eva-

sion, an attempt * * * wilfully made, to defeat and evade a portion of his tax" (R. 70-72).

(3) Relative to Petitioner's Tax Payments Before Indictment Period.

Over objection, the trial court admitted in evidence a record of petitioner's income tax payments from 1933 through 1950, the payments before 1945 being admitted on the theory that they were used to construct the beginning net worth (R. 6). In ruling on the objection, the judge volunteered that, "the jury will be instructed, of course, to disregard it save only as it may relate to the net worth statement in the beginning of the period" (R. 7). The Revenue Agent subsequently testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25).

The prior tax evidence was that petitioner had paid no income taxes prior to 1940; that taxes were paid for 1940 in the amount of $57.59; for 1941, in the amount of $429.02; and that two, three, and four thousand dollars were paid for 1942, 1943, and 1944, respectively (R. 6-7). After said testimony, the Government's next witness testified that prior to 1942 the petitioner had acquired the following properties: 1941 Packard automobile, costing $1,300 (R. 11); 1941 Willys automobile, costing $600 (R. 11); Hollywood Buffet, for which he paid $2,000 in 1939 (R. 14-15); real estate at 3708 Flora, for which he paid $1,000 in 1940 (R. 15); Buckhorn Bar, for which he paid $4,000 during "the thirties" (R. 14); real estate at 15th and Belmont, for which he paid $4,100 in 1927 (R. 15); residence at 3114 Karnes, purchased for $4,500 in 1941, partly by loan and mortgage (R. 15); and Richelieu Apartments, purchaser for $71,525.26 in 1941, partly by loan and mortgage (R. 15).

(4) Relative to Improper Argument and Instructions.

In support of its claim that petitioner received $50 a week from taverns, in addition to reported income based on a percentage of gross receipts, the Government called as witnesses Ruby McIntosh and John David McIntosh, tavern operators (R. 16, 18). Mrs. McIntosh testified that she paid $50 only intermittently, and the Government was permitted to cross-examine her, under the claim of surprise (R. 16). Mr. McIntosh testified that he did not remember exactly how much he paid petitioner, and did not have $50 payments in his records, although he kept records of everything he paid him; whereupon, the Government obtained leave to cross-examine, again claiming surprise (R. 19). On Government's cross-examination, he concluded, "I must have paid, I guess. I don't know" (R. 20). Both witnesses testified their leases called for $50 as "minimum rent" (R. 18, 20); and further stated that they did not report any $50 payments as deductions on their tax returns (R. 18, 20). Petitioner did not testify at the trial; but his wife testified that she was continuously with petitioner when percentage payments were made out of gross receipts by the operators at the end of each week, and that in her presence no $50 payments were made (R. 41-47). Relative to said testimony, the Government's closing argument contained the following:

> "* * * Here were this Mr. and Mrs. McIntosh * * * They * * * started to lie to you, and started to tell you they didn't pay him this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65).

Relative to the same testimony, the trial court charged:

> "There was evidence on the part of the lessees that the $50.00 per month (*sic*) was paid * * *. There

was evidence on the part of some of the witnesses that they did not observe it was paid. That kind of testimony is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73).

Relative to appellant's failure to testify, there was the following comment in Government's closing arguments:

> "Not one single solitary witness denied it (the alleged $50 payments which petitioner's wife denied were paid in her presence)" (R. 61).
>
> "I felt sorry for Mrs. Mitchell when she was on the stand the other day * * * here is a lawsuit where a man tries to save his own bacon by hiding behind the skirts of his own dear, little wife" (R. 62).

In commenting on testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

The Court refused (R. 65) petitioner's request for an instruction to correct the above-stated erroneous rule—that negligence of third persons would be no defense to a tax evasion prosecution—and instructed the jury generally (R. 70) on the issue of willfulness, without referring to the specific situation where, as here, the books, records, and tax returns were prepared by third persons (R. 44, 43, 46, 48-51).

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

(1) In sanctioning submission to jury of Government's Net Worth case.

(2) In sanctioning admission into evidence of petitioner's financial statements, and instructions thereon.

(3) In sanctioning admission into evidence of record of petitioner's income tax payments for twelve years prior to indictment period.

(4) In holding it could not consider erroneous instructions and argument, and failure of proof, where not brought to trial court's attention.

(5) In disregarding errors at trial, on theory competent proof was sufficient to sustain conviction.

(6) In sustaining conviction despite errors in instructions and argument.

(7) In affirming the judgment of the trial court.

REASONS FOR GRANTING THE WRIT.

(1) Conflict of Decisions and Constitutional Question Respecting Burden of Producing Evidence in Net Worth Prosecutions.

With unimportant factual differences, the legal situation here is comparable with that presented in litigation now pending before this Court, *Remmer* v. *U. S.*, No. 304, Certiorari Granted, November 16, 1953, 346 U. S. 884. In that case, the Government attempted to prove income tax evasion by the Net Worth method, comparing a Net Worth Statement prepared by Government agents for the end of

the period in question with a statement similarly prepared for the beginning of said period, and treating the net worth increase, so computed, as income. In the *Remmer* case, as stated by the Court of Appeals, the Government failed to prove the amount of cash in a safe deposit box at the beginning of the period, and thereby failed to exclude prior accumulated assets as a non-income source of the apparent net worth increase. 205 F. 2d 277, 287. In the instant case, there was *no* evidence offered relative to gifts and inheritances received by petitioner during the tax period, and the Government thereby failed to exclude those sources of non-income increase, which would account for the indicated net worth increase. Likewise, borrowed money as a source was not excluded, as the Government's evidence as to loans was not comprehensive, being limited to banks in which petitioner maintained deposits (R. 15-16, 96, 102).

In this case, as in the *Remmer* case, petitioner contends that the Government must prove unreported income by excluding non-income items, such as prior accumulations, gifts, inheritances, loans, etc. It is likewise necessary to exclude market valuations and to use cost values in making calculations, so as to exclude unrealized market value increases in computing the net worth increase which is considered to be income. See Point Two, *infra*. Many authorities rule that the Government cannot make a showing of increase in assets, and then throw upon a taxpayer in a criminal prosecution the burden of producing evidence that the increases are not income.

> "* * * The prosecution has the burden of establishing any money received as being true income." *Clawson* v. *U. S.*, (C. A. 9) 198 F. 2d 792, 794.

> "* * * the case should not have been submitted to the jury since it did not exclude the hypothesis that

the funds * * * might have been from sources other than current business income." *Bryan* v. *U. S.*, (C. A. 5) 175 F. 2d 223, 227.

"In using this net worth test to determine discrepancies in the taxpayer's return of his income, care must be taken not to charge the taxpayer with income which may be a change in form of some capital which he has owned all the time or receipts such as gifts or inheritances which do not constitute taxable income." *U. S.* v. *Williams*, (C. A. 3) 208 F. 2d 437, 438.

See:

U. S. v. *Caserta*, (C. A. 3) 199 F. 2d 905, 907.
Demetree v. *U. S.*, (C. A. 5) 207 F. 2d 892, 893-4.
U. S. v. *Fenwick*, (C. A. 7) 177 F. 2d 488.
U. S. v. *Smith*, (C. A. 3) 206 F. 2d 905, 911.

The theory behind this rule has Constitutional dignity. Mere proof of increase in assets no more justifies an inference that such increases represent income than the equally reasonable conclusion that they represent loans, gifts, or inheritances. Since there is a reasonable hypothesis consistent with the taxpayer's innocence, the presumption of innocence forbids the jury to speculate on the matter and thus requires the issue to be withdrawn from the jury. *Bryan* v. *U. S.*, *supra*; *U. S.* v. *Fenwick*, *supra*, 492. This Court has ruled that under the Due Process clause of the Fifth Amendment, in a Federal criminal trial, the Government cannot, by means of an arbitrary presumption, escape the burden of proof and cast upon the defendant the obligation of exculpation. *Tot* v. *U. S.*, 319 U. S. 463. While this decision overturned an arbitrary statutory presumption, a judge-made rule freeing the Government from proving the necessary elements of its case, and casting the burden on a defendant to disprove the same, is

even more patently intolerable. *Krulewitch* v. *U. S.*, 336 U. S. 440, 456-8; *Morissette* v. *U. S.*, 342 U. S. 246, 275.

In Net Worth prosecutions, there exists a contrary line of authority, recently criticized by Chief Judge Hutcheson when he stated that some courts have been "more concerned with easing the difficulties attending the proof of guilt by (the Net Worth) method than with preserving unimpaired the constitutional rights of a defendant * * *" *Demetree* v. *U. S.*, *supra*, 894. While that opinion refrains from citing criticized decisions of other courts, the adverse comment clearly applies to the controlling decision in the Eighth Circuit, where the Court permitted the jury to convict a taxpayer although stating, "The evidence of the government does not exclude the possibility that the defendant had some substantial accumulation of capital (at the beginning of the tax period, or that he acquired during the period) a large amount of capital out of which he made the loans, investments and expenditures which the government contends reflect income." *Schuermann* v. *U. S.*, (C. A. 8) 174 F. 2d 397, 399. In other words, no proof was made that the increases were income. While the Court attempted to rationalize the decision by stating the untenable proposition that proof of increased assets "will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return," the burden of the Court's remarks shows that the inference is primarily a rule of convenience to aid the prosecution. l. c. 399. The most extensively-considered authority contrary to the *Bryan-Fenwick* decisions, *supra*, is *Bell* v. *U. S.*, (C. A. 4) 185 F. 2d 302; but even in that case there was proof, contrary to the situation here, that the defendant had not received gifts or inheritances during the tax period. l. c. 307.

In considering whether the inference of income drawn from mere proof of increased assets is founded in reason or is an arbitrary guess, doing violence to the presumption of innocence, it is apparent that the only reason to prefer the possibility of income over the possibility of gifts, loans, inheritances, etc., is the loose, lay-reasoning that a person charged with crime is likely to come forth with proof of his innocence, if it exists and he is in possession of the same. Such reasoning, however, is forbidden in a criminal trial. As stated in the opinion of this Court, by Mr. Justice Roberts:

> "In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all facts essential to guilt. This is not permissible." *Tot* v. U. S., 319 U. S. 463, 469.

The Court may note that, while this question was presented to the Court of Appeals (R. 119), that Court held it was disabled from considering the same because it had not been presented to the trial court (R. 127). This was completely erroneous, since the trial court could not grant proper relief, being bound by the decision of the Court of Appeals in the *Schuermann* case, *supra*. It would have been worse than useless to request relief at the trial level, since petitioner would have been urging the trial judge to commit error, under the rule presently controlling him. Moreover, it is settled that a failure of proof should be corrected by an appellate court, even though not noted below, since

there can be no plainer or more substantial error than a failure of proof. *U. S.* v. *Norton*, (C. A. 2) 179 F. 2d 527; *U. S.* v. *Renee Ice Cream Co.*, (C. A. 3) 160 F. 2d 353; *Strickland* v. *U. S.*, (C. A. 5) 155 F. 2d 167. See Point Five, *infra*. The case was submitted to the jury on two theories, one of which was not made; and the judgment must be reversed, because on such a record the Court cannot know but what petitioner's conviction rested on the case not made. *Terminiello* v. *City of Chicago*, 337 U. S. 1, 5; *Shelton* v. *U. S.*, (C. A. D. C.) 165 F. 2d 241, 244-5; see *Kotteakos* v. *U. S.*, 328 U. S. 750, 765; Point Four, *infra*. This must be particularly true where, as here, the failure of proof affected the principal theory. As noted in the Statement, page 4, the alternative (specific omissions) theory involved relatively small amounts of money.

Having granted certiorari in the *Remmer* case, *supra*, where a similar question exists, and with the plain failure of proof in the instant case now before the Court, petitioner respectfully submits that the time is ripe for a solution to the conflict between the appellate courts on the burden of proof in Net Worth prosecutions, wherein conviction now depends upon the accident of residence; and further submits that the principles of the *Tot* case, *supra*, be applied to all criminal cases, without special advantages being granted to the prosecution of income tax charges.

(2) Erroneous Admission into Evidence and Instruction upon Petitioner's Financial Statements.

Petitioner presents herewith a strikingly erroneous misuse of purported evidence, preventing a fair trial, and likely to recur when income is computed by the Net Worth method. As previously noted, Net Worth calculations of income require that the Net Worth statements so used be

prepared on cost valuations, so as to exclude from such calculations market value increases which are not income until realized. The Government agent testified to this fact (R. 8, 9, 11, 26), and it is a well established rule in Net Worth prosecutions. Schwerdtfeger, "Federal Prosecutions of Income Tax Cases," 40 Ky. L. J. 400, 404, n. 10. "Enrichment through increase in value of capital investments is not income in any proper meaning of the term." *Eisner* v. *Macomber*, 252 U. S. 189, 214-15.

Notwithstanding the settled basic requirement of valuation at cost in a prosecution of this character, the Government supported its Net Worth theory with evidence which directly conflicted with the cost premise, and the trial judge departed therefrom by attempting to calculate petitioner's income by comparing Government's beginning net worth, based on cost, with a closing net worth, based on market values containing at least $150,000 increase over the cost basis. The jury was misled and confused by said evidence into erroneously treating as taxable income mere unrealized increases in value of assets held—not sold or in any manner transferred—and into convicting petitioner for failing to report as income such increases which were not income.

In his Statement herein, page 7, petitioner has compiled a tabulation showing the extent of increased market values over cost, as contained in petitioner's financial statement of October, 1950, two months before the end of the six year period involved in this trial. The same tabulation was presented below (R. 121) and is unchallenged; but the opinion of the Court of Appeals erroneously stated, "there was no evidence that the (financial) statements included any increase in value as distinguished from income" (R. 126). Likewise, although petitioner twice objected to comparison of a Government's cost-value Net

Worth Statement with petitioner's financial statements, based on market values, the trial judge overruled the objections, and calculated purported income by means of such erroneous comparison (R. 12-14, 30, 72). The objections made to the evidence fully preserved petitioner's right to challenge the instructions. *U. S.* v. *Kelinson*, (C. A. 2) 205 F. 2d 600, 601. Only this Court can prevent petitioner's conviction, arrived at by the flagrantly erroneous method of treating $150,000 in market value increases as unreported income.

The error here complained of was expressly conveyed to the jury in the trial judge's instruction, wherein he deducted the (cost) net worth at the beginning of the period from the (market value) net worth at the end of the period, computed petitioner's income as being approximately $60,000 a year (R. 72), compared same with petitioner's reported income averaging some $35,000 a year (R. 71-72), emphasized that these calculations were based on petitioner's own financial statements concerning which "there is no controversy," and specifically urged the jury to consider said facts on the question of willful evasion (R. 72). It should be further noted that the $150,000 increase in market values over cost, ascertainable from said financial statements, fully explains the unreported increase of $25,000 a year, as computed above, and marks the difference between evidence supporting the Government's case and evidence supporting petitioner. See further calculation in petition for rehearing (R. 133).

The highly prejudicial error herein discussed cannot be passed over with the slighting comment that the same "could not be prejudicial" (R. 126) because there was sufficient proof, other than that here challenged, to present a question for the jury. Point Four, *infra*. Judgment should be reversed, to preserve petitioner's right to a fair trial, and

to prevent further misuse of market value financial statements in Net Worth computations of income.

(3) Erroneous Admission into Evidence of Petitioner's Prior Tax Payments.

Petitioner presents herewith erroneously-admitted evidence creating improper suspicion of tax evasion in years long prior to the period for which petitioner was indicted, preventing a fair trial, and likely to recur in prosecutions of this nature. Over objection, testimony was admitted in evidence that petitioner paid no income taxes for the years 1933-1939, that he paid only $57.59 for 1940 and $429.02 for 1941, and that he paid more substantial taxes, amounting to two, three and four thousand dollars for 1942, 1943, and 1944, respectively (R. 6-7). Immediately after this testimony, there was testimony that prior to 1942 petitioner had acquired two automobiles, including a Packard; two taverns, costing $6,000; miscellaneous real estate costing $9,600; and a $70,000 apartment building, purchased in May, 1941, partly by loan and mortgage (R. 11, 14, 15). No comment need be made to establish the prejudicial nature in an income tax prosecution of such evidence, showing large acquisitions of property by a defendant who paid little or no taxes. The legal impropriety of such prejudicial matter relating to years long prior to the indictment period is well settled. *Wolcher* v. *U. S.*, (C. A. 9) 200 F. 2d 493, 497; *Boyer* v. *U. S.*, (C. A. D. C.) 132 F. 2d 12, 13.

The Government's purported justification for offering said prior tax payments in evidence was that they could be used to construct the beginning net worth (R. 6). Subsequently, the Government's Revenue Agent disavowed and disapproved the above justification, when he testified that taxes paid prior to 1945 would have no bearing upon the Government's Net Worth Statement (R. 25). On the

present record, no justification has been offered, nor can be offered, for the admission of this highly prejudicial matter.

In reviewing this objection (R. 127), the Court of Appeals demonstrated the recurring nature of this type of alleged proof in Net Worth prosecutions, by relying on three recent decisions in the Eighth Circuit, alone. *Leeby* v. *U. S.*, 192 F. 2d 331; *Hanson* v. *U. S.*, 186 F. 2d 61; *Schuermann* v. *U. S.*, 174 F. 2d 397. Petitioner does not argue with the holding in the *Hanson* case, *supra*, where defendant's failure to pay taxes in prior years was admitted in rebuttal to his contention that he had accumulated extensive assets prior to the tax period involved. l. c. 66. In the instant case, the occasion for such rebuttal never arose, since petitioner during trial agreed with the Government as to his beginning net worth (R. 14). The *Schuermann* case, *supra*, is not in point, because there was no prejudice from the introduction of the prior tax returns, there being no testimony of accumulated assets during said period. l. c. 399. In *Leeby* v. *U. S.*, *supra*, the evidence of nontaxable returns (l. c. 333) was admissible to rebut the disputed evidence by defendant that he had accumulated substantial assets during said years (l. c. 332); and petitioner need not argue with the result of that case. The Court there stated in dictum that the prior returns would have some bearing on defendant's intent (l. c. 334), but this dictum is inconsistent with the trial court's instructions in that case which were favorably quoted, to the effect that the defendant's prior returns are presumed to be in compliance with the law, and that there is no charge of evasion during said years. l. c. 333. The question of fraudulent intent cannot sustain the introduction of such evidence in the instant case, since there is a break of four years between the last year for which returns are suspiciously small and

the first year of the indictment. This break is too long to support use of said evidence on the question of intent, even assuming that prior returns are sometimes admissible on said theory. *Wolcher* v. *U. S.*, *supra*, *Boyer* v. *U. S.*, *supra*.

One statement in the *Leeby* case, *supra*, should be considered. That is the statement, quoted in the present opinion (R. 127), that, "In estimating defendant's income * * * on the net worth basis, the witness considered the question of his income or want of income prior to 1944 and we think the testimony was admissible for that purpose * * *." l. c. 333. This vague statement finds no support in the Court's reasoning, and appears to be a conclusion on a question of accounting, induced by the opinion of the Government's "expert witness," or by counsel's interpretation thereof. In the present case, this erroneous statement is clearly answered by the Government's witness who testified that the prior tax payments had no bearing on beginning net worth (R. 25). The Court's erroneous statement in the *Leeby* case, *supra*, should be corrected on the basis of the present record, so that the Government will not have a meaningless pretext for introducing prejudicial evidence into all Net Worth prosecutions. For this reason, judgment should be reversed.

(4) Erroneous Application of Harmless Error Rule.

Rule 52(a), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The leading authorities interpreting and applying this "harmless error" rule likewise date from 1946. *Bollenbach* v. *U. S.*, 326 U. S. 607; *Bihn* v. *U. S.*, 328 U. S. 633; *Kotteakos* v. *U. S.*, 328 U. S. 750. This Court recently stated the harmless error rule in the following

cautious language: "Where it is made to appear affirmatively * * * that the alleged error could not affect the result, such errors may be disregarded even in the review of criminal trials." *Brown* v. *Allen*, 344 U. S. 443, 460. The Court of Appeals for the Eighth Circuit, however, has made sweeping use of the harmless error rule in the instant case, in violation of the above authorities, and of petitioner's right to a fair, substantially unprejudiced trial.

The most that can be said for the Government's side of this case is that "the scales were quite evenly balanced"; certainly fair analysis would not reveal an "open and shut" case. *Bihn* v. *U. S.*, *supra*, 638. See Statement, pages 4-6 herein. The acquittal as to two years (R. 80) indicates the jury was in some doubt. *U. S.* v. *Wicoff*, (C. A. 7) 187 F. 2d 886, 891. Since petitioner is not relying on mere formalities or technicalities, the burden of establishing an overwhelming case such as would override the errors is upon the Government. *Kotteakos*, *supra*, 760. This Court has clearly advised the courts of appeal that the Government cannot escape reversals for substantial errors by claiming that there was proof, apart from the errors, which would support a conviction. *Bollenbach*, *supra*, 614; *Kotteakos*, *supra*, 765. "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government." *Bihn* v. *U. S.*, *supra*, 638-9. "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty * * * it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused,

however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach* v. *U. S.*, *supra*, 615. See *Meeks* v. *U. S.*, (C. A. 9) 163 F. 2d 598, 602.

Despite the above guiding rules, the Court of Appeals departed completely from said standards in ruling that the improper admission and use of appellant's financial statements (Point Two, *supra*) "could not be prejudicial" because "there was abundant competent proof aside from these questioned exhibits" to support the conviction (R. 126). In addition, the Court confused the bare minimum of evidence sufficient to prevent a directed verdict with the overwhelming evidence necessary to override substantial error. This clear distinction, commented upon by Judge Frank in his dissenting opinions in *U. S.* v. *Rubenstein*, 151 F. 2d 915, 921-2, and *U. S.* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 650, was forgotten by the Court when it seized upon petitioner's quite proper failure under the circumstances to move for a directed verdict as an element in finding the errors at trial to be harmless (R. 126-7).

The errors complained of, and their substantiality, are discussed at length under petitioner's Points One, Two, Three, and Six, and will not be repeated under this topic. Petitioner concludes that the errors are substantial, prejudicial, and destructive of his right to a fair trial, that the harmless error rule cannot properly give appellate courts pause in reversing this conviction, and that the clear misconstruction of Rule 52(a) by the Court below should be corrected by this Court.

(5) Conflict of Decisions and Erroneous Application of Plain Error Rule.

Rule 52(b), Federal Rules of Criminal Procedure, 18 U. S. C. (1946), provides that, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." Despite this controlling rule of procedure, the Court of Appeals for the Eighth Circuit has ruled that it cannot consider the sufficiency of the evidence to sustain the conviction unless raised below (R. 127); and, likewise, that erroneous instructions and arguments to the jury will not be considered unless "objections were made or exceptions saved" in the trial court (R. 128). These rulings are now the settled law of said Circuit under recently decided cases: *Leeby* v. *U. S.*, *supra*; *Finnegan* v. *U. S.*, 204 F. 2d 105; *Myres* v. *U. S.*, 174 F. 2d 329, 339.

Except for incidental quotation in a case involving Rule 52(a) (*Echert* v. *U. S.*, 188 F. 2d 336, 341), Rule 52(b), permitting plain error to be noticed and corrected, though not raised below, has not even been honored by citation by the Court of Appeals for the Eighth Circuit. 2 Shepard's Federal Reporter Citation 2128; Supplement, January, 1954, 347, tabulating citations of Rule 52(b) by this Court and the other Federal Courts, reveals that since its adoption in 1946, the Rule has been cited in fifty decisions. This Court and all courts of appeal except those for the Fourth, Sixth, and Eighth Circuits, have applied the Rule. It is apparent that, if the Rule gives appellate courts a measure of discretion, the courts of appeal have been using widely varying standards of discretion, and that the latter courts (C. A. 4, C. A. 6 and C. A. 8) have been applying standards which effectively abolish the Rule. Petitioner urges this Court to use this case as an appropriate method

for bringing an end to such illegal and inharmonious standards.

In his petition for rehearing, petitioner cited decisions of this Court and the courts of appeal from all but the Fourth, Sixth, and Eighth Circuits, in which, contrary to the announced rule in the Eighth Circuit, consideration was given to alleged errors in instructions and argument, though no objection was made thereto at trial (R. 139-140). The Court refused a rehearing (R. 143), thereby refusing to join harmoniously with this Court and the other eight circuits.

In the instant case, the Court of Appeals for the Eighth Circuit gave its initial express consideration to Rule 52(b); and adopted a limitation from the Fourth Circuit (which has never cited the Rule) which effectively destroys the Rule. The Eighth Circuit adopted the following language, "We exercise the power to notice plain error not assigned (*sic*) only where necessary to prevent a miscarriage of justice * * *'" (R. 129). In paraphrasing Rule 52(b), said Court likewise added the qualification that the error, to be considered though not presented to the trial court, must be "plain error affecting substantial rights *and resulting in a miscarriage of justice*" (R. 129), the words italicized by us not being contained in the Rule. Thus, unless convinced of an appellant's innocence—an unusual situation, surely, after indictment, trial and conviction by a jury—the Court of Appeals for the Eighth Circuit will refuse to consider the error. The area of discretion is thereby severely limited in a manner which mocks the Rule.

In considering the evidence apart from the errors relied upon, and in refusing to consider the nature of said errors, the Eighth Circuit failed to note that the only issue under Rule 52(b)—distinguishing it from Rule 52(a)—is

whether the errors relied upon but not raised below are "plain" errors; i. e., whether such errors are clear, or too obscure for the trial court to understand and recognize, without being told. Rule 52(a), (b), 18 U. S. C. Where the error is "plain," the trial court's responsibilities for fair conduct of the trial do not cease merely because no objection is heard. The situation is not uncommon when "the trial judge should have stopped counsel's discourse without waiting for an objection." *Viereck* v. *U. S.*, 318 U. S. 236, 248.

The issue under Rule 52(b) is whether the errors complained of are "plain"; this requires consideration of the nature of the specific errors urged upon the appellate court. In direct opposition to the practice indicated by the Rule, the Court below refused to look at the cited points of error in argument and instructions, and directed its attention toward all matters in the Record *except* the errors cited (R. 128-129). Then, acting as a jury and concluding that guilt "was established beyond a reasonable doubt by substantial competent evidence" (R. 129), the Court brushed aside eight of the eleven issues presented in petitioner's brief (Points I(b), I(c), II, IV(b), IV(c), V(a), V(b), V(c)—R. 119-120). The seriousness and substantiality of the erroneous instructions on petitioner's financial statements, and the failure of proof as to the Net Worth method have already been indicated (Points One, Two, *supra*). The other matters are briefly stated under Point Six, *infra*. For the procedural error of the Court of Appeals in refusing to consider the nature of the cited errors, and because of the plainness and substantiality of those errors, as discussed elsewhere, the judgment should be reversed.

(6) Erroneous Instructions and Argument.

Relative to the sharply disputed evidence as to petitioner's alleged receipt of payments of $50 a week from taverns, in addition to reported income of a percentage of gross receipts (R. 16-21, 41, 47), and to Government's cross-examination of the tavern operators on the claimed theory of "surprise" (R. 16, 19), the Government's closing argument erroneously and prejudicially contained the following: "Here were this Mr. and Mrs. McIntosh * * *. They * * * started to lie to you, and started to tell you they didn't pay this $50.00 * * *. The Court let us cross examine on the theory they were unwilling and weren't telling the facts and the truth" (R. 64-65). The argument as to the theory on which the trial court allowed cross examination attributed to the trial judge the position of invading the province of the jury. *McNutt* v. *U. S.*, (C. A. 8) 267 Fed. 670, 673. Such an emphatic conclusive statement, if made by the judge, would be reversible error even though he also stated that the jury is the ultimate trier of the facts. *Quercia* v. *U. S.*, 289 U. S. 466; *Cook* v. *U. S.*, (C. A. 8) 14 F. 2d 833. The jury was justified from these comments, acquiesced in by the trial judge, to conclude that during the course of the trial a final decision had been made by the judge that "the facts and the truth" were that said payments had been made.

Supporting the above erroneous and prejudicial concept, the trial judge instructed that Mrs. Mitchell's testimony that such payments were not made in her presence, and that she was always present when profits were divided between petitioner and the operators (R. 41-47) "is what the courts would call negative testimony, and it is testimony that is not strong. It was weak testimony as compared with the positive testimony of witnesses who said the $50.00 per month (*sic*) was paid" (R. 73). This

instruction on "negative testimony," without precedent in any reported Federal criminal trial, was clearly erroneous. *State* v. *Davies*, 101 Ohio St. 487, 129 N. E. 590. Even in a civil case, the instruction was improper, on the facts herein. 42 Harvard Law Review 422, 425; 2 Wigmore on Evidence (3rd Ed.), Sec. 664, pages 781-2; *U. P. R. Co.* v. *Burnham*, (C. A. 10) 124 F. 2d 500, 502; *Eiseman* v. *Penn. R. Co.*, (C. A. 3) 151 F. 2d 222. Under no circumstances should instructions on negative evidence, as artificially light-weight testimony, be permitted in criminal trials in Federal Courts. 2 Thompson on Trials, Sec. 2417, pp. 1763-4.

In view of the testimony by Mrs. Mitchell that the alleged $50 payments were not made in her presence, the Government's argument that, "Not one single solitary witness denied it" (R. 61) must be taken as a reference to the possibility that payments were made to petitioner secretly, out of his wife's presence. As such, and since petitioner did not testify, it was an illegal reference to his failure to testify. *Barnes* v. *U. S.*, (C. A. 8) 8 F. 2d 832, 834. Another such illegal reference is contained in the argument that, by having his wife testify, petitioner was "hiding behind the skirts of his own, dear little wife" (R. 62). This is reversible error. *Wilson* v. *U. S.*, 149 U. S. 60; *DeMayo* v. *U. S.*, (C. A. 8) 32 F. 2d 472, 475.

In commenting upon testimony by petitioner's wife that she had negligently omitted to include certain rents in the tax returns (R. 44), and testimony as to mistakes of bookkeepers and accountants (R. 47-55), the Government's closing argument stated:

> "They can't * * * come into court and say * * * 'The bookkeeper came in and put it on. My wife came in and put it on. It is her fault not mine.' You can't escape in that way. If you could there would be no man ever prosecuted for tax evasion" (R. 65).

This argument makes petitioner criminally liable for the negligence of his agents, and was clearly erroneous. *Lurding* v. *U. S.*, (C. A. 6) 179 F. 2d 419, 421. A considerable portion of defendant's evidence concerned itself with the fact that petitioner did not personally control or have knowledge of his bookkeeping and tax-reporting system (R. 43, 46, 48-51). In view of said testimony, and the aforesaid improper argument, it was reversible error for the trial court to reject petitioner's suggested instruction (R. 65), correcting said argument and informing the jury of the law applicable to said defense. *Lurding* v. *U. S.*, *supra*.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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